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Hearing Date: February 9, 2006, 10:00 a.m.
Objection Deadline: February 2, 2006

-and-

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Attorneys for Movant Thermo NITON Analyzers LLC
formerly known as Niton, LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re:

DELPHI CORPORATION, et al.,

Debtors.

Chapter 11

Case No., 05-44481(RDD)

(Jointly Administered)

**NOTICE OF MOTION BY THERMO NITON ANALYZERS LLC FOR
RELIEF FROM STAY TO EFFECT SETOFF**

PLEASE TAKE NOTICE, that on February 9, 2006 at 10:00 a.m., or as soon as thereafter as counsel can be heard, Thermo NITON Analyzers LLC, formerly known as Niton, LLC (“NITON”), by its attorneys, Roach & Carpenter, P.C. and Moritt Hock Hamroff & Horowitz LLP, will move this Court before the Honorable Robert D. Drain at the United States Bankruptcy Court for the Southern District of New York located the Alexander Hamilton Custom House,

One Bowling Green, New York, New York 10004, for an entry of an Order pursuant to 11 U.S.C. §§362 and 553, for relief from the stay to effect setoff.

PLEASE TAKE FURTHER NOTICE, that objections, if any, to the Motion shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, shall state the name of the objectant, the basis of the objection and state with particularity the grounds therefor and shall be filed with the Bankruptcy Court electronically as follows: (a)(i) through the Bankruptcy Court's electronic filing system (in accordance with Order M-242), which may be accessed through the Internet at the Bankruptcy Court's website: www.nysb.uscourts.gov, using Netscape Navigator software version 3.0 or higher and (ii) in portable document format (PDF) using Adobe Exchange software for conversion; or (b) if a party is unavailable to file electronically, such party shall submit the objection in PDF format on a diskette in an envelope with the case name, case number, type and title of document, document number to which the objection refers and the file name on the outside of the envelope; or (c) if a party is unable to file electronically or use PDF format, such party shall submit the response or objection on a diskette in either Word, WordPerfect, or DOS text (ASCII) format. A response or objection filed by a party with no legal representation shall comply with section (b) or (c) as set forth in this paragraph. Responses or objections shall be filed, and a hard copy of the objection, whether filed pursuant to section (a), (b) or (c) as set forth in this paragraph, shall also be delivered to the Chambers of the Honorable Robert D. Drain and served on the undersigned counsel, at the address set forth below, so as to be

received no later than 2 p.m. on February 2, 2006, as per the Case Management Order. Only those responses or objections that are timely filed, served and received will be considered by the Bankruptcy Court.

Respectfully submitted,

/s/ Leslie A. Berkoff
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To: All parties as per Case Management Order

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Counsel for Thermo NITON Analyzers LLC
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re:

DELPHI CORPORATION, et al.,

Debtors.

Chapter 11

Case No., 05-44481(RDD)

(Jointly Administered)

**THERMO NITON ANALYZERS LLC'S MOTION FOR RELIEF FROM
AUTOMATIC STAY FOR LIMITED PURPOSE OF EFFECTUATING
SETOFF OF PRE-PETITION AMOUNTS BETWEEN NITON AND DEBTOR**

Thermo NITON Analyzers LLC, formerly known as Niton, LLC ("Niton"), by its undersigned counsel, respectfully moves this Court for an order to modify the automatic stay for the limited purpose of effectuating a setoff of amounts owed by Niton to one of the debtors against amounts owed by that debtor to Niton, pursuant to 11 U.S.C. §§362 and 553 of the

Bankruptcy Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure. In support of this Motion, Niton respectfully states:

INTRODUCTION

1. On October 8, 2005 (the “*Petition Date*”), Delphi Corporation and certain of its subsidiaries and affiliates (the “*Debtors*”) commenced their respective reorganization cases by filing voluntary petitions for relief under chapter 11 of 11 U.S.C. §§ 101 et seq., as amended (the “*Bankruptcy Code*”).
2. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.
3. Niton is a Delaware limited liability corporation with a principal place of business located at 900 Middlesex Turnpike, Building 8, Billerica, Massachusetts. It is a developer and producer of portable x-ray fluorescence technology used in various applications including quality assurance and quality control in various manufacturing processes.
4. Prior to the Petition Date, on June 24, 2002, Niton and Debtor Delphi Medical Systems Colorado Corporation (“*Delphi Colorado*”)¹ entered into a Contract Manufacturing Agreement whereby Delphi Colorado agreed to manufacture and Niton agreed to purchase certain products for Niton (the “*Contract*”). A copy of the Contract is attached as *Exhibit A*.
5. Under the terms of the Contract, Delphi Colorado purchased from Niton certain components to manufacture the products.
6. Under the terms of the Contract, the Contract is to be construed and enforced in accordance with the laws of the State of Colorado. Contract ¶ 23.

¹ The contract was executed between Niton, LLC and Peak Industries, Inc. On December 7, 2004, Peak Industries, Inc., filed an Article of Amendment changing its name to Delphi Medical Systems Colorado Corporation.

7. As of the Petition Date, as a result of certain overpayments, credits and accounts payable due to Delphi Colorado, Niton owed Delphi Colorado \$517,177.13 (the “*Debt*”).

8. As of the Petition Date, Delphi Colorado in turn owed \$173,555.26 (the “*Claim*”) to Niton under the terms of the Contract. A schedule of the Niton’s relevant unpaid invoices for Delphi Colorado’s purchase orders is attached hereto as *Exhibit B*.

9. Since the Petition Date, Niton has continued to support the Debtor by supplying goods on credit terms, and has paid the Debtor the sum of \$343,621.87 representing the difference between the Debt and the Claim.

RELIEF REQUESTED

10. For the reasons set forth herein, Niton requests relief from the automatic stay for the limited purpose of effectuating a setoff with Delphi Colorado.

BASIS FOR RELIEF REQUESTED

A. Right of Setoff

11. Section 553 of the Bankruptcy Code preserves any rights of setoff that may exist between a creditor and debtor. “The right of setoff ... allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.' (citation omitted)” *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995). There must be mutuality, *i.e.*, the debts must be due and owing to the same two parties and must have arisen prepetition. *See, Scherling v. Hellman Elec. Corp. (In re Westchester Structures)*, 181 B.R. 730, 739 (Bankr. S.D. N.Y. 1995). “In general, the right of setoff allows parties who have prepetition debts to each other to assert the amounts owed on these debts, subtract one from the other, and then pay only the balance.” *In re Johnson*, 216 B.R. 381, 385 (Bankr. N.D. Ill. 1997) (citations omitted).

12. "Under § 553, a creditor with an independent right of setoff may setoff a debtor's obligations only if the creditor satisfies three elements. First, the creditor must owe a debt to the debtor that 'arose before the commencement of' the bankruptcy proceedings. Second, the creditor must have a claim against the debtor that 'arose before the commencement of' the bankruptcy proceedings. Third, the creditor's and debtor's obligations must be mutual. (citations omitted.)" *U.S. v. Myers (In re Myers)*, 362 F. 3d 667, 672 (10th Cir. 2004). *See also, Scherling*, 181 B.R. at 739.

13. First, Niton clearly owes a "debt" to Delphi Colorado. As stated above, Niton owed Delphi Colorado \$517,177.13 as of the Petition Date on account of certain overpayments, credits and payables.

14. For the same reason, Niton clearly holds a valid and enforceable "claim" against Delphi Colorado that arose before the commencement of the case. 11 U.S.C. § 101(5)(A).² As stated above, Delphi Colorado owed Niton \$173,555.26 as of the Petition Date under the terms of the Contract. In *Johnson v. Home State Bank*, 505 U.S. 78, 83, 111 S.Ct. 2150 (1991) the Supreme Court stated a "right to payment" means "nothing more nor less than an enforceable obligation." (internal quotation omitted). Accordingly, a claim arises pre-petition for set-off purposes when some "right to payment" exists pre-petition; that is, when an enforceable obligation exists at the time the debtor files his bankruptcy petition.

15. Here, Niton had a right to payment from Delphi Colorado at the time of shipment of the components to Delphi Colorado. Further, Delphi Colorado's pre-petition acceptance of

² Section 101 of the Bankruptcy Code defines "claim" as any "right of payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . ." 11 U.S.C. § 101(5).

the components gave Niton a pre-petition right to payment for set-off purposes pursuant to Article 2 of the Uniform Commercial Code as adopted by Colorado. See Colo.Rev.Stat. See §§ 4-2-507(1), 4-2-606(1); 4-2-607(1).³

16. Finally, the claim and the debt are “mutual” as they are “due to and from the same person in the same capacity.” *Packaging Ind. Group v. Dennison Mfg. Co., Inc. (In re Sentinel Prods.)*, 192 B.R. 41, 45 (N.D.N.Y. 1996) (citations omitted). Clearly, this requirement is here, as Delphi Colorado owes Niton funds pursuant to the Contract, and Niton owes Delphi Colorado funds pursuant to the same Contract.

17. The Bankruptcy Code does not itself create a right of setoff, but rather merely preserves any rights of setoff that exist under federal or state law. See *Strumpf*, 516 U.S. at 18. The Contract is governed by the law of the State of Colorado, which recognizes a common law right of setoff. *Eckles v. Petco, Inc., Interstate (In re Balducci)*, 33 B.R. 847, 850 (Bankr. D. Colo. 1983)(“In Colorado, the doctrine of setoff has long been recognized”) citing *Thatcher v. Rockwell*, 4 Colo. 375, appeal dismissed, 105 U.S. 467 (1878); *Walter E. Heller & Co. v. Lindsey*, 146 Colo. 452, 361 P.2d. 979 (1961).

³ § 2-507. *Effect of Seller's Tender*

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

§ 2-606. *What Constitutes Acceptance of Goods.*

(1) Acceptance of goods occurs when the buyer
(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
(b) Fails to make an effective rejection . . .
(c) Does any act inconsistent with the seller's ownership . . .

§ 2-607. *Effect of Acceptance*

(1) The buyer must pay at the contract rate for any goods accepted.

18. Therefore, given Colorado law recognizes a right of setoff and the exercise of this right meets all the conditions required for a setoff under Section 553 of the Code, Niton has the right to setoff the debt against the claim.

B. Relief from Stay

19. Because Delphi Colorado sought the protection of the Bankruptcy Code, the automatic stay prevents Niton from setting off the amount it owes to Delphi Colorado. 11 U.S.C. §362(a)(7). Niton is therefore seeking relief from the automatic stay pursuant to Section 362(d)(1) for “cause.”

20. Although “cause” is not defined in the Bankruptcy Code, in deciding whether to grant relief from the stay, courts look to “the policies underlying the automatic stay in addition to the competing interests of the debtor and the movant.” *In re Continental Airlines, Inc.*, 152 B.R. 420, 424 (Bankr. D. Del. 1993).

21. Niton submits that cause exists to grant it relief. It has established that it has the right of setoff under the applicable state law. It should be permitted to exercise that right.

22. No prior motion for the relief requested herein has been made to this Court or any other court.

23. Notice of this Motion will be provided by electronic transmission through the Court’s electronic filing system, overnight delivery or first class mail to chambers, the parties on the Master Service List and the 2002 List Parties, pursuant to the Case Management Order entered on October 14, 2005. (See the Affidavit of Service to be filed with the Court)

24. Niton respectfully requests that the requirement of the service and filing of a separate memorandum of law under Local Rule 9013-1(b) be deemed satisfied because all of the points and authorities on which it is relying are set forth herein.

WHEREFORE, Nition LLC, respectfully requests the entry of an order, a copy of which is annexed as Exhibit "C", whereby the automatic stay will be modified for the limited purpose of permitting it to setoff the pre-petition balance owed to it by Delphi Medical Systems of Colorado Corporation under the Contract against the debt it owes to Delphi Medical Systems of Colorado Corporation, as well as such other and further relief as the Court deems just and proper.

Dated: January 3, 2006

Respectfully submitted,

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